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# CALIFORNIA INITIATIVE REVIEW

## Proposition 19: Regulate, Control and Tax Cannabis Act of 2010. Initiative Statute.

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## I. EXECUTIVE SUMMARY

Proposition 19 is a measure that would change California law by allowing legal possession, consumption, and cultivation of cannabis under certain circumstances. Proposition 19 would make California marijuana laws the most lenient of any in the world, surpassing the Netherlands and Portugal where marijuana is merely decriminalized. Proposition 19 leaves several aspects of legalization open for the state and/or local governments to decide. For this reason many of the actual effects remain unknown at this time. California voters have a number of issues to consider before casting their votes on Proposition 19.

A “yes” vote on Proposition 19 means that any person 21 years or older could lawfully possess, cultivate, and consume marijuana in California, subject to the measure’s restrictions. The proposition gives authority to local governments to regulate taxes and controls on marijuana within their respective counties. However, under federal law, activity involving possession, cultivation, or consumption remains unlawful. Finally, Proposition 19 does not purport to interfere with Proposition 215, the Compassionate Use Act.

If Proposition 19 does not pass, marijuana will remain illegal unless authorized by California’s existing Compassionate Use Act.

## II. THE LAW

### a. Existing Law

#### i. California law

Under California law, it is currently illegal to possess, cultivate, or distribute marijuana.<sup>1</sup> Proposition 215, which voters passed in 1996, legalized marijuana for medical purposes, thus carving out an exception to this general prohibition.<sup>2</sup> Under Proposition 215, or the Compassionate Use Act, the laws regarding possession and cultivation of marijuana do not apply to patients or their physicians if possession or cultivation of marijuana is for the patient’s personal medical use and the patient obtained a prescription by the physician.<sup>3</sup>

In late 2003, the senate passed and the Governor signed California Senate Bill 420. This bill sought to clarify the scope of the application of Proposition 215 and also facilitated identification of those eligible to use or give prescriptions for medical marijuana. The purpose was to avoid unnecessary arrest and prosecution of qualified patients and physicians.<sup>4</sup> The identification system under SB 420 is voluntary and not required in order to obtain medical marijuana.<sup>5</sup> Proposition 215 and SB 420 set out the only legal way to cultivate and use marijuana in California at this time.

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<sup>1</sup> Legislative Analyst’s Office, *Proposition 19*, submitted July 2010, *available at*: [http://www.lao.ca.gov/ballot/2010/19\\_11\\_2010.pdf](http://www.lao.ca.gov/ballot/2010/19_11_2010.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> NORML, California State Penalties, *available at*: [http://norml.org/pdf\\_files/state\\_penalties/NORML\\_CA\\_State\\_Penalties.pdf](http://norml.org/pdf_files/state_penalties/NORML_CA_State_Penalties.pdf).

<sup>4</sup> SB 420 §1(a), 2003 Gen. Assem., Reg. Sess. (Ca. 2003).

<sup>5</sup> *Id.*

The penalty for violation of California marijuana laws is not as harsh as federal penalties. Currently in California, possession of 28.5g or less of marijuana constitutes a misdemeanor and a maximum fine of \$100.<sup>6</sup> Possession occurring on school grounds results in a \$500 fine and a sentence of 10 days in jail.<sup>7</sup> Possessing more than 28.5g of marijuana will result in a misdemeanor, a fine of \$500, and 6 months in jail.<sup>8</sup> Further, unlawful cultivation of marijuana can lead to a felony arrest, resulting in 16 to 36 months in jail.<sup>9</sup> Finally, if an adult attempted to unlawfully sell marijuana in California, he or she would face felony charges and anywhere from 2-7 years in jail, depending on how much was sold and whether it was sold to a minor.<sup>10</sup>

However, SB 1449 was passed by the Assembly on August 30, 2010 and was signed by the Governor on October 1, 2010.<sup>11</sup> This bill will go into effect on January 1, 2011, and will change the above mentioned penalties for marijuana possession. Senate Bill 1449 reduces the penalty for possessing less than one ounce of marijuana to an infraction rather than a misdemeanor.<sup>12</sup> Depending on what happens on November 2, Proposition 19 may supercede SB 1449 for Californians over 21 years old.<sup>13</sup>

Another bill, AB 2254 (also known as the Ammiano Bill), would legalize marijuana for people 21 and over and would put certain controls and taxes in place to regulate possession, consumption, and sale.<sup>14</sup> More precisely AB 2254 requires a \$50-per-ounce excise tax paid at the point of sale in addition to sales tax.<sup>15</sup> It also requires the revenue to be spent exclusively on drug education and rehabilitation programs.<sup>16</sup> Current criminal statutes forbidding driving under the influence or possessing marijuana on school property would remain intact under AB 2254.<sup>17</sup> This bill is currently in the committee process and there are no hearings scheduled at this time.

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<sup>6</sup> NORML, California State Penalties, *available at*:  
[http://norml.org/pdf\\_files/state\\_penalties/NORML\\_CA\\_State\\_Penalties.pdf](http://norml.org/pdf_files/state_penalties/NORML_CA_State_Penalties.pdf).

<sup>7</sup> NORML, California State Penalties, *available at*:  
[http://norml.org/pdf\\_files/state\\_penalties/NORML\\_CA\\_State\\_Penalties.pdf](http://norml.org/pdf_files/state_penalties/NORML_CA_State_Penalties.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Peter Hecht, *Governor Signs Bill to Downgrade Pot Possession to an Infraction*, Sacramento Bee, October 3, 2010, *available at*: <http://www.sacbee.com/2010/10/03/3075206/governor-signs-bill-to-downgrade.html>.

<sup>12</sup> Beau Kilmer, Et Al., *Altered State? Assessing How Marijuana Legalization in California Could Influence Marijuana Consumption and Public Budgets* at 10 (RAND Corp., 2010), *available at*:  
[http://www.rand.org/pubs/occasional\\_papers/2010/RAND\\_OP315.pdf](http://www.rand.org/pubs/occasional_papers/2010/RAND_OP315.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> Kilmer, *supra* note 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

### ii. Federal law

Under the Federal Controlled Substances Act passed in 1970, Marijuana is an illegal substance.<sup>18</sup> Violations of this federal law carry harsher penalties than violations under California law.<sup>19</sup> For example, under federal law, possession of any amount of marijuana for a first time offender can be punishable by a \$1,000 fine and one year in jail.<sup>20</sup> A second offense of possession of any amount of marijuana requires a mandatory minimum sentence of 15 days in jail and a fine of up to \$2,500; any subsequent offense carries a minimum of 90 days in jail and up to a \$5,000 fine.<sup>21</sup>

The sale or cultivation of marijuana also holds harsher penalties under federal law, ranging from 5 years to life and from \$250,000 to \$4,000,000 in fines.<sup>22</sup> Furthermore, if marijuana is sold to a minor or within 1,000 feet of a school, the penalty is doubled.<sup>23</sup> Federal law also allows for the death penalty to be imposed under certain circumstances if a person is convicted of distributing a controlled substance as part of a continuing criminal enterprise.<sup>24</sup>

For the purposes of Proposition 19, the intersection between state and federal law on this subject becomes important. Pursuant to the U.S. Supreme Court Case *Gonzales v. Raich*, the Federal Government has the authority to prosecute Californians for possession, cultivation, and/or the sale of marijuana, even if this activity is legal under state law.<sup>25</sup> The most recent Bush administration occasionally raided medical marijuana dispensaries and growers that supplied the dispensaries.<sup>26</sup> The Obama administration has stated that it will not prosecute medical marijuana users, growers, or dispensaries as long as they follow state law; however, it will continue to enforce laws against marijuana production and consumption generally.<sup>27</sup> However, more recently, Attorney General Eric Holder stated that the federal government will “vigorously enforce” federal law if Proposition 19 is passed.<sup>28</sup> If the federal government follows through on this promise, the success of Proposition 19 could be at stake.

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<sup>18</sup> 21 U.S.C.A. § 801.

<sup>19</sup> Legislative Analyst’s Office, *supra* note 1.

<sup>20</sup> NORML, Federal Penalties, *available at*:  
[http://norml.org/pdf\\_files/state\\_penalties/NORML\\_US\\_State\\_Penalties.pdf](http://norml.org/pdf_files/state_penalties/NORML_US_State_Penalties.pdf).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>26</sup> Kilmer, *supra* note 12.

<sup>27</sup> *Id.* at 10.

<sup>28</sup> John Hoeffel, *Holder Promises to Enforce U.S. Drug Laws if Prop. 19 Passes*, submitted October, 2010, *available at*: <http://www.chicagotribune.com/news/nationworld/la-me-marijuana-holder-20101016,0,1075129.story?track=rss>.

**b. Proposed Changes to the Law**

*i. In general*

Proposition 19 changes California Law regarding marijuana sale, possession and consumption. Specifically, Proposition 19 makes it legal for an individual to possess, share, and transport one ounce of marijuana or less for personal consumption.<sup>29</sup> Personal consumption means use of marijuana in a private residence or other non-public place, or use of marijuana at a facility licensed by state or local law to be used for marijuana sale and consumption. Proposition 19 also makes it lawful for a private property owner, or other lawful resident of the private property, to cultivate marijuana on a plot not larger than 25 square feet.<sup>30</sup> It states that individuals leasing or renting property may also cultivate within these guidelines, but growing may be subject to the permission of the private property owner.<sup>31</sup>

*ii. Laws affected by Proposition 19*

In order to make legal use of marijuana possible, Proposition 19 would repeal criminal laws relating to marijuana.<sup>32</sup> More specifically, it would make various Health and Safety Code sections, which now criminalize possession of marijuana and drug paraphernalia, growth and sale of marijuana, maintaining a place for the purpose of selling or giving away marijuana, and transporting marijuana in a car, unenforceable.<sup>33</sup>

*iii. Restrictions on the right to personal marijuana use*

Proposition 19 contains numerous restrictions on marijuana consumption and use.<sup>34</sup> Individuals not licensed by state or local law are prohibited from selling marijuana.<sup>35</sup> Additionally, interstate or international transportation of marijuana is prohibited.<sup>36</sup> Laws prohibiting driving while impaired still stand, thus driving while under the influence of marijuana is prohibited.<sup>37</sup> The proposition would also not affect laws prohibiting use of controlled substances in the workplace by persons whose jobs involve public safety.<sup>38</sup>

Regarding minors, Proposition 19 would not affect California Penal Code § 272, which criminalizes contribution to the delinquency of a minor.<sup>39</sup> In addition, consumption in any space while minors are present is unauthorized, and any laws prohibiting marijuana possession on school

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<sup>29</sup> Text of Proposition 19, *available at*:  
[http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i821\\_initiative\\_09-0024\\_amdt\\_1-s.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i821_initiative_09-0024_amdt_1-s.pdf).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Cal.Health & Safety Code §§ 11054, 11014.5, 11364.5, 11357, 11054, 11358, 11359, 11360, 11366, 11366.5, 11370, 11470, 11479, 11703, 11705, 23222, 40000.15.

<sup>34</sup> Text of Proposition 19, *supra* note 29.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; Vehicle Code section 23152.

<sup>38</sup> Text of Proposition 19, *supra* note 29.

<sup>39</sup> *Id.*

grounds are not affected by Proposition 19.<sup>40</sup> The text also provides penalties for those who provide marijuana to a minor, or involve a minor in marijuana transportation. These penalties depend on the age of the minor involved.<sup>41</sup>

### *iv. Local government authority and taxation*

Under Proposition 19, local governments are authorized to create any controls regarding marijuana that are necessary for protection of the public.<sup>42</sup> Controls that most local governments are expected to enact include rules furthering the goal of prohibiting access to marijuana by persons under age 21, regulations creating civil fines or other remedies for unlawfully obtained or possessed marijuana, and other regulations regarding premises licensed to sell marijuana, such as zoning ordinances and proper hours of operation, advertising limitations, etc.<sup>43</sup> Proposition 19 does not specifically dictate how marijuana will be taxed, and instead leaves it up to local governments, or the state, to determine what the tax will be.<sup>44</sup> Revenue raised by marijuana sales will be fed back into the local governments, and does not have to be used for any specific purpose, unlike other marijuana legislation such as the Ammiano Bill mentioned previously.<sup>45</sup>

The Act can also be amended by the Legislature to establish a statewide system for commercial regulations and taxes. The initiative can be amended by another measure, submitted to a vote at a statewide election, or by a statute passed by the Legislature and signed by the Governor. Any amendment must be to further the purpose of the act.<sup>46</sup>

## III. LIKELY EFFECTS OF PROPOSED CHANGES

### *i. Fiscal effect*

Perhaps the most highly anticipated aspect of Proposition 19 is the promise of increased revenue for California, especially in light of the current economic instability. The California Board of Equalization asserts that it is impossible to predict the net revenue that would be generated if Proposition 19 passed.<sup>47</sup> This is because the initiative leaves it up to local governments to decide how to regulate marijuana and how much of a tax to impose.<sup>48</sup> In addition, the federal response to legalization would also impact the amount of revenue generated from taxes and regulation.<sup>49</sup>

Another aspect of legalization that has the potential to generate large amounts of revenue is the spin-off industry. Some sources estimate this industry to be worth \$12-18 billion. However, the actual revenue derived from Proposition 19 and the spin-off industry will depend on the extent to

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Legislative Analyst's Office, *supra* note 1.

<sup>43</sup> Text of Proposition 19, *supra* note 29.

<sup>44</sup> Legislative Analyst's Office, *supra* note 1.

<sup>45</sup> Text of Proposition 19, *supra* note 29.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 53.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

which the federal government impedes legalization, the level of consumption, retail value of marijuana, and the actual tax and fee rates.<sup>50</sup>

Along the same line as increased revenue, Proposition 19 purports to aid California's high unemployment rate by producing both jobs and revenue for job creation. As previously discussed, revenue gained from legalization may not be as high as expected and therefore jobs created from that revenue might be limited. The spin-off industry, however, has the potential to create many new jobs in tourism, souvenirs, coffee houses, and related paraphernalia.<sup>51</sup> Even the possibility of a marijuana related food product industry exists as a result of legalization that would raise revenues and create jobs.<sup>52</sup> One estimate claims that if the marijuana industry is just one-third the size of the wine industry it will generate as many as 50,000 jobs.<sup>53</sup>

Opponents are not quite as optimistic. They argue that the illegal market for marijuana will still exist and that prices will always be lower for illegal marijuana than for legal marijuana.<sup>54</sup> It follows that the illegal market will circumvent a portion of the revenue gained from legalization. There are also additional costs to legalization that are not always included in the estimates on how much revenue could be gained.

In determining the net revenue that Proposition 19 will generate, it is essential to consider in the costs involved. Costs include regulating marijuana-related activities, enforcing the regulations, and possible litigation arising from federal preemption.<sup>55</sup> The costs associated with regulation have the potential to be significant, but they are also extremely unpredictable as each local government is given the authority to determine which regulations it will impose and to what extent it will impose them.<sup>56</sup> This could result in some counties prohibiting marijuana all together, which would reduce the expected amount of revenue. In addition, Proposition 19 would give the Legislature room to amend the act by a simple majority vote. Many predict that the Legislature will amend the initiative to give the state government a uniform power of regulation over marijuana.<sup>57</sup> Therefore, the amount of revenue that marijuana legalization would raise is heavily dependent on whether regulation occurs at the state or local level.<sup>58</sup> There are also incidental costs associated with developing the regulatory frame work including publications, paperwork, computer systems, training staff etc.<sup>59</sup> Finally, there are indirect costs associated with legalization including drug treatment programs, educational programs, health care costs, lost productivity and wages, and loss of quality of life.<sup>60</sup>

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<sup>50</sup> *Id.* at 192.

<sup>51</sup> Kilmer, *supra* note 12.

<sup>52</sup> *Id.* at 52.

<sup>53</sup> Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold?*, 6 *Wis. L. Rev.* 1350, 1367 (2009).

<sup>54</sup> *Id.* at 1369.

<sup>55</sup> Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?* *Berkley J. of Crim. Law* (2010) at 189.

<sup>56</sup> *Id.* at 189.

<sup>57</sup> *Id.*

<sup>58</sup> Text of Proposition 19, *supra* note 29.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 191.

As discussed below, a final factor to consider in the fiscal effect of Proposition 19 is the potential to save money by removing marijuana related offenses from California's criminal system.

*ii. Effect on the criminal system and prison overcrowding*

Marijuana related offenses are among the most common reasons for arrests in the United States and more than 80% of these arrests are for simple possession.<sup>61</sup> In California, 61,000 people were arrested for misdemeanor marijuana possession.<sup>62</sup> By legalizing marijuana cultivation, possession and consumption for adults the majority of these arrests would be eliminated thus saving resources and jail space for more violent criminals. Further, adjudication of these cases would also no longer be necessary. Proponents project a savings of about a billion dollars in California each year stemming from reduced costs associated with the arrests, adjudication and jail sentences.<sup>63</sup>

Notably, however, arrests for marijuana are less expensive than other types of arrests and are less likely to be prosecuted.<sup>64</sup> In addition, in order to obtain increased revenues from the marijuana tax, police officers would have to spend significant resources ensuring that marijuana sales are licensed by local governments and therefore in compliance with Proposition 19.<sup>65</sup> Officers would also continue to arrest those who provide marijuana to minors, or minors who cultivate, possess or use the drug. Further, many offenders plead down to a lesser marijuana charge when they have actually been arrested on more serious charges, and therefore legalizing marijuana may not keep this population out of prison.<sup>66</sup>

In addition, as mentioned earlier, Governor Schwarzenegger recently signed SB 1449, which will reduce simple possession of marijuana from a misdemeanor to an infraction.<sup>67</sup> This means that an individual found with 28.5g of marijuana or less will pay a maximum of \$100 and will not be required to appear in court.<sup>68</sup> Any possession greater than 28.5g will continue to be considered a misdemeanor.<sup>69</sup> Therefore, part of the Proponents' argument that legalization will reduce prison costs and overcrowding will be taken care of when SB 1449 goes into effect on January 1, 2011.

Proposition 19 would have the effect of eliminating the large numbers of misdemeanor marijuana offenses, but due to these other factors, it is not clear whether California would save a significant amount of money from these changes to the criminal system.

*iii. Effect on drug violence in California and Mexico*

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<sup>61</sup> Kilmer, *supra* note 12.

<sup>62</sup> Yes on Prop 19, Ballot Argument section, *available at*:

<http://yeson19.com/sites/default/files/Yes%20on%2019%20-%20Ballot%20Argument.pdf>.

<sup>63</sup> Vitiello, *supra* note 53 at 1366.

<sup>64</sup> Kilmer, *supra* note 12.

<sup>65</sup> Vitiello, *supra* note 53 at 1366.

<sup>66</sup> Kilmer, *supra* note 12.

<sup>67</sup> Hecht, *supra* note 11.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

Many find America's Prohibition Era instructive on the question of whether legalization of marijuana will help to curb the drug violence in California and Mexico. The motivation of Prohibition Era mobsters was the same motivation fueling modern day drug cartels: profits.<sup>70</sup> After the prohibition on alcohol was repealed, much if not all of the violence surrounding alcohol subsided. The hope is that the violence surrounding marijuana would disappear in much the same way.<sup>71</sup>

The drug war is more complex than the Prohibition Era violence, however, because many cartels traffic various drugs in addition to marijuana and they distribute the drugs to a much larger market than California.<sup>72</sup> While passing Proposition 19 might puncture drug traffickers' marijuana sales in California, the cartels would likely continue to traffic other drugs in California and the market for marijuana in the rest of the U.S. would continue to flourish.<sup>73</sup> Therefore, it is not clear that drug violence would subside with the passage of Proposition 19.

While it is not clear that passing Proposition 19 would have any effect on curbing drug violence, it would pave the way for other states and even Mexico to follow suit. Therefore, if passed, Proposition 19 would be one step closer to curtailing the cartel business.

#### *iv. Effect on personal consumption*

It is difficult at best to determine whether consumption of marijuana will increase if Proposition 19 passes. Marijuana use is already prevalent and widespread in California and the U.S. Some statistics show that more than 25 million Americans have used marijuana in the past year and about 40% of Americans have used marijuana at some point in their lives.<sup>74</sup> As for use in California, 16 million ounces of marijuana are consumed each year and there are over 190,000 patients registered to use medical marijuana.<sup>75</sup> With such a high percentage of people that use or have used marijuana, many argue that increase in consumption after legalization will be slight if any. These same people contend that even if more Californians began to use marijuana, only a very small number of those people would become chronic users.<sup>76</sup>

One of the main reasons that increase in consumption is difficult to predict is that Proposition 19 allows local governments to impose an additional tax on marijuana.<sup>77</sup> If marijuana becomes less expensive after legalization, it is likely that consumption would increase. However, if marijuana becomes more expensive, that tends to suggest that consumption would decrease.<sup>78</sup>

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<sup>70</sup> Steven B. Duke, *Drugs: To Legalize or Not*, Wall Street Journal, April 25, 2009, available at: <http://online.wsj.com/article/SB124061360462654683.html>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Patton, *supra* note 55 at 170.

<sup>75</sup> *Id.*

<sup>76</sup> Vitiello, *supra* note 53 at 1389.

<sup>77</sup> Text of Proposition 19, *supra* note 29.

<sup>78</sup> *The Law of Weed*, The Economist, July 15, 2010, available at: <http://www.economist.com/node/16591136>.

One of the bigger concerns about increased consumption is not whether more adults would use, but rather, whether more teens will use marijuana. The rationale is that the passage of Proposition 19 sends a message that marijuana use is acceptable.<sup>79</sup> This argument hinges on the fact that marijuana will become more readily available and mainstream and teens will jump on the marijuana bandwagon.<sup>80</sup> To rebut this, however, is the example of the Netherlands where marijuana is prevalent, but the rate of teen consumption is much lower than in the United States.<sup>81</sup> The theory is that if teens do not see using marijuana as ‘cool,’ they will be less influenced to use it.<sup>82</sup> This phenomenon occurred with cigarettes use and teens. A contrary example is alcohol, which remains popular among teens despite its legal nature for adults.<sup>83</sup>

In sum, while legalization may send a message to Californians that marijuana is safe and acceptable to use, there will be educational movements to combat this notion and inform citizens of the risks of marijuana use. Because of the foregoing, any attempt to predict the likely effect of legalization on personal usage is a mere hypothesis at best.

v. *Effect on law regarding driving under the influence*

Many people are concerned about the effect that legalizing marijuana will have on traffic safety. If more individuals smoke marijuana as a result of legalization, it is possible more people will drive while under the influence. Because marijuana negatively affects motor skills, more people driving while under its influence could result in increased risk on the roads.<sup>84</sup> However, proponents, point to the Netherlands, where marijuana is decriminalized, but, has one of the lowest road fatality rates.<sup>85</sup> In addition, two of California’s most marijuana friendly counties, Santa Cruz and San Francisco, reported zero marijuana related road fatalities in 2008.<sup>86</sup> It is difficult to say with certainty what the effect of legalization on road safety will be.

Determining when someone is actually “under the influence” is also an issue. California Police Chiefs oppose Proposition 19 because there is no standard set forth in the initiative for what constitutes driving under the influence of marijuana.<sup>87</sup> However, the initiative states that Proposition 19 is not intended to affect Vehicle Code section 23152, which relates to driving while under the influence.<sup>88</sup> Therefore, the procedures that police currently use to determine whether someone is driving under the influence of marijuana will likely continue to be used, and testing will likely proceed in the same manner it does now. Accordingly, the complications that currently

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<sup>79</sup> Vitiello, *supra* note 53 at 1386.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Kilmer, *supra* note 12.

<sup>84</sup> U.S. Drug Enforcement Administration, *Exposing the Myth of Smoked Medical Marijuana*, available at: <http://www.justice.gov/dea/ongoing/marijuana.html#2>.

<sup>85</sup> Dale Gieringer, *Viewpoints: Risk of Stoned Drivers Minimal with Prop. 19*, August, 2008, available at: <http://www.sacbee.com/2010/08/08/2943086/risk-of-stoned-drivers-minimal.html>.

<sup>86</sup> *Id.*

<sup>87</sup> Dianne Feinstein, *Argument Against Proposition 19*, available at <http://blogs.sacbee.com/weed-wars/No%20on%20Prop%2019%20Ballot%20Argument%20FINAL%20%282%29.pdf>.

<sup>88</sup> Text of Proposition 19, *supra* note 29.

exist regarding identifying marijuana related DUIs will persist, but Proposition 19 should not make identifying individuals driving under the influence any better or worse.

*vi. Effect on employers and businesses*

Opponents have expressed concerns that passing Proposition 19 will require employers to allow employees to smoke marijuana while at work, and that employers will not have control over employees marijuana use until it actually “impairs” performance. However, courts are likely to hold otherwise. In *Ross v. RagingWire Telecommunications, Inc.* (“Ross”), the court held that the employer could take the plaintiff’s use of marijuana into consideration when making a hiring decision, even though the plaintiff used marijuana for chronic pain upon the recommendation of a physician.<sup>89</sup> In addition, the court stated that because marijuana is still illegal under federal law, California laws regarding fair employment practices do not require employers to accommodate employee use of marijuana.<sup>90</sup> The court reasoned that nothing in the text of the Compassionate Use Act indicated that the law was intended to address the rights of employers.<sup>91</sup> In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* (“*Emerald Steel*”), a case analyzing the impact of Oregon’s Medical Marijuana Act, an Oregon court reached the same conclusion as *Ross*.<sup>92</sup> Specifically, the *Emerald Steel* court found that, although the plaintiff was authorized to use marijuana under the Oregon Medical Marijuana Act, the employer did not violate antidiscrimination law by failing to provide plaintiff with a reasonable accommodation, or by terminating plaintiff for medical marijuana use authorized by state law.

As stated in *Ross*, although Proposition 19 makes use of marijuana legal for all people over 21 in California,, marijuana is still illegal under federal law. In addition, the text of Proposition 19 states that the initiative is not intended to “affect any law prohibiting use of controlled substances in the workplace or by specific persons whose jobs involve public safety.”<sup>93</sup> Therefore, it is unlikely that courts will interpret Proposition 19 as prohibiting employers from ensuring their employees do not use marijuana, much less requiring employers to allow employees to smoke on the job. Both the Compassionate Use Act and Proposition 19 do not indicate any intent to address the rights of employers; therefore, the court is likely to conclude, as it did in *Ross*, that employers may still terminate, or refuse to hire, based on an individual’s marijuana use.

*vii. Effect on health related matters*

The impact that proposition 19 would have on health if it were to pass is highly debated. According to the U.S. Drug Enforcement Administration marijuana is an addictive drug with serious health consequences.<sup>94</sup> The short term effects of marijuana are memory loss, distorted perception, trouble with thinking and problem solving, loss of motor skills, decrease in muscle

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<sup>89</sup> *Ross v. RagingWire Telecommunications, Inc.* 42 Cal.4th 920, 926 (2008).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* 348 Or. 159, 190, 230 P.3d 518, 535 (Or.,2010).

<sup>93</sup> Text of Proposition 19, *supra* note 29.

<sup>94</sup> U.S. Drug Enforcement Administration, *supra* note 84.

strength, increased heart rate, and anxiety.<sup>95</sup> Studies have also shown that someone who smokes five joints a week may be exposed to the same amount of cancer-causing elements as an individual who smokes a pack of cigarettes a day.<sup>96</sup> Other research has shown that smoking one marijuana cigarette deposits around four times more tar into the lungs than a filtered tobacco cigarette.<sup>97</sup> On the other hand, other sources suggest that occasional use of marijuana is rarely seriously harmful. In addition, some sources state that marijuana is only psychologically addictive, not physically addictive.<sup>98</sup> Cigarettes and alcohol on the other hand are widely known to be physically addictive.

The U.S. Drug Enforcement Administration also states that teens are seeking treatment for marijuana more than alcohol or any other drug.<sup>99</sup> This fact could be especially disconcerting, if marijuana is a “gateway drug” as some believe.<sup>100</sup> However, even if marijuana use is correlated with use of other illicit drugs, this does not mean that using marijuana causes people to go on to experiment with other drugs; there could be a third factor, e.g. a personality characteristic, that makes individuals more likely to try marijuana, and other drugs in general.<sup>101</sup>

One factor mitigating the health risks of marijuana is the fact that it does not need to be smoked. It can be ingested in food or as a tea.<sup>102</sup> In addition, using a vaporizer to consume marijuana gives patients the same control over dosage that smoking provides, without inhalation of the toxic substances in smoke.<sup>103</sup>

### *viii. Effect on Prop 215*

It is not likely that Proposition 19, if passed, will affect an individual’s rights under Proposition 215, the Compassionate Use Act. This is because the California principles of statutory interpretation dictate that overlapping statutes are to be interpreted harmoniously if possible.<sup>104</sup> See the section below on Proposition 215.

## IV. CONSTITUTIONAL ISSUES

### *i. Preemption*

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> National Drug and Alcohol Abuse Hotline, *Addiction*, available at: <http://www.drug-rehabs.org/addiction.htm>; Office of National Drug Control Policy, *What Americans Need to Know About Marijuana*, at 4, available at [http://www.ncjrs.gov/ondcphpubs/publications/pdf/mj\\_rev.pdf](http://www.ncjrs.gov/ondcphpubs/publications/pdf/mj_rev.pdf).

<sup>99</sup> U.S. Drug Enforcement Administration, *supra* note 85.

<sup>100</sup> Nathan Salant, *Solano Police Chiefs Oppose Proposition 19*, available at <http://www.examiner.com/solano-county-buzz-in-san-francisco/solano-police-chiefs-oppose-proposition-19>.

<sup>101</sup> WebMD, *Marijuana Use and its Effects*, March 2010, available at: <http://www.webmd.com/mental-health/marijuana-use-and-its-effects>.

<sup>102</sup> *Id.*

<sup>103</sup> Cheryl A. Jay et al., *Marijuana Vaporizer Provides Same Level of THC, Fewer Toxins, Study Shows*, May, 2007, available at: <http://www.sciencedaily.com/releases/2007/05/070515151145.htm>

<sup>104</sup> *Kirby v. Immoos Fire Protection, Inc.* 186 Cal.App.4th 1361, 1370, (2010); *Earley v. Superior Court* 79 Cal.App.4th 1420, 1427, 95 (2000)

Although passage of this initiative would legalize personal use of marijuana in California under state law, it would still be prohibited under federal law. Federal law prohibits all marijuana related activities. Previous litigation regarding the conflict between federal and California law legalizing medical marijuana (the Compassionate Use Act) can help predict what will likely happen in the event that Proposition 19 is passed. In *Gonzales v. Raich*, users of marijuana for medical purposes in California attempted to obtain a judgment holding that the Controlled Substances Act, which is the federal law prohibiting marijuana use, would be unconstitutional if applied to them.<sup>105</sup> The Supreme Court instead held that the federal government has the authority to regulate intrastate growth and use of marijuana, and therefore, the individuals could be federally prosecuted, even though they complied with state law.<sup>106</sup>

Under the Supremacy Clause, when there is a conflict between federal and state law, the federal law is controlling.<sup>107</sup> Accordingly, if Proposition 19 is passed, those who use marijuana in compliance with the proposition could be federally prosecuted. However, it does not mean that the law will be struck down. Whether or not the law is actually struck down will depend on the court's preemption analysis. The court will determine whether federal law preempts state law by either discerning whether physical compliance with both state and federal law is possible, or by deciding whether state law is an obstacle to the objectives and purposes of federal law. The California Court of Appeals for the Fourth District has heard two cases regarding federal preemption of the Compassionate Use Act, and ruled in both that federal law did not preempt state law authorizing medical use of marijuana.<sup>108</sup> In these two cases, *County of San Diego v. San Diego NORML*, and *City of Garden Grove v. Superior Court*, the court concluded that physical compliance with both state and federal law was possible, i.e., state law did not significantly impede accomplishment of federal objectives.<sup>109</sup>

It is possible that a court would come to the same conclusion regarding the conflict between Proposition 19 and federal law. However, the preemption analysis for Proposition 19 could be affected by the fact that the conflict between Proposition 19 and federal law is greater than the level of conflict between the state laws which permit only *medical* use of marijuana. Also, whether federal law is found to preempt California law permitting personal use of marijuana will depend on the preemption analysis used.<sup>110</sup> If courts determine the preemption issue by looking at whether Proposition 19 is an obstacle to accomplishing the objectives set forth in the Compassionate Use Act., i.e., stopping illicit drug use and trafficking, preemption is likely.<sup>111</sup> Courts may also analyze the preemption issue by determining whether complying with both federal and state law is physically impossible.<sup>112</sup> While Proposition 19 is not in direct conflict with federal law, e.g. by requiring individuals to commit an act that is prohibited by federal law, it does prompt

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<sup>105</sup> *Gonzales, supra* note 25.

<sup>106</sup> *Id.*

<sup>107</sup> U.S.C.A. Const. Art. VI cl. 2.

<sup>108</sup> *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d at 461; *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 678 (2007).

<sup>109</sup> *Id.*

<sup>110</sup> Patton, *supra* note 55 at 180.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

local governments to create regulations for taxing and selling marijuana.<sup>113</sup> Under this analysis, it is possible that federal law would preempt state law.<sup>114</sup>

Although California courts have not found California's Medical Marijuana Act to be preempted by federal law, *Emerald* provides another example of a preemption analysis.<sup>115</sup> In *Emerald Steel*, the Oregon Supreme Court determined whether the Oregon Medical Marijuana Act was preempted the Controlled Substances Act.<sup>116</sup> The court first used the physical impossibility test mentioned above, and held that it was not impossible.<sup>117</sup> The court, however, went on to state that the physical impossibility test is usually not the test that ultimately determines the outcome of the preemption analysis, and that the dispositive question is whether state law is an obstacle to the accomplishment of the objectives of Congress, and to the purpose behind the federal act.<sup>118</sup> The court concluded that because the state law "affirmatively authorized" conduct (marijuana use) that the federal law prohibited, the state law was preempted.<sup>119</sup> It is not mandatory that California courts follow the Oregon court's decision, but it is possible California courts may follow similar logic in analyzing Proposition 19.

Whether or not the law is challenged on a preemption basis, there still remains the possibility of federal prosecution for individuals engaged in marijuana use even though they are in compliance with state laws. However, under the Obama Administration, the threat of federal prosecution for personal use or licensed sale of marijuana may be minimal. The Obama administration has stated that it will pursue prosecution of individuals who are violating federal and state rules regarding marijuana, not individuals who are only violating federal laws. Some sources though, have expressed concern that full legalization, rather than legalization for medical purposes, will change the federal government's perspective.<sup>120</sup> When asked how the federal government would respond to legalization of marijuana, Gil Kerlikowske, Director of the White House Office of National Drug Control Policy, refused to answer the question, stating only that legalization would be a significant issue.<sup>121</sup> More recently, Attorney General Eric Holder warned that if Proposition 19 passes, the federal government will vigorously enforce federal law against Californians using marijuana recreationally and in compliance with Proposition 19. In sum, if Proposition 19 is passed, there is a good chance that the federal government will prosecute people and businesses for marijuana sale and use that is in compliance with state law.<sup>122</sup> How this conflict between state law and federal law will ultimately end is unknown.

## V. DRAFTING ISSUES

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Emerald Steel Fabricators*, *supra* note 92 at 176.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Patton*, *supra* note 55 at 180.

<sup>121</sup> *Id.*

<sup>122</sup> *Hoeffel*, *supra* note 28.

### *i. Severability clause*

In section 6 of Proposition 19 the drafters incorporated a severability clause, which states that if any provision of the initiative is held to be invalid, it shall be severed and the rest will remain enforceable.<sup>123</sup> Severability clauses, however, do not always ensure that the remainder of a severed proposition will be enforced.

Under California law, three criteria must be met for a clause to be severed.<sup>124</sup> The first is that the invalid provision must be grammatically separate. The second criterion is that the invalid provision must be functionally separate. The final criterion is that the invalid provision must be volitionally separate, i.e., the proposition would have been voted it into law without the invalid provision.<sup>125</sup>

If challenged it is difficult to tell at this point which, if any, of the Proposition's provisions would be severable. Additionally, if challenged, the court would apply the three-part test and if an unconstitutional portion is found in-severable, the entire initiative would be held invalid. One situation where this may occur is if the Federal Government decides to enforce federal prohibition. In that instance it is likely that Proposition 19 would disappear altogether because the main purpose of the bill will be severed and there would be nothing left to enforce.<sup>126</sup>

### *ii. Amending the initiative*

The text of Proposition 19 leaves many questions unanswered. For instance, Proposition 19 often refers to 'licensed premises for sale' of marijuana, but does not include any provisions describing how a seller would obtain such licensed premises.<sup>127</sup> It also lacks any mechanism for registration of private cultivators.<sup>128</sup> It may be up to local governments to decide whether and how to issue a license or register a grower, but without explicit language, an amendment might be necessary to clarify how this process will proceed. Proposition 19 incorporates a process for such amendments that appears to be a workable system, though litigation is likely to arise.

In general, legislative acts cannot amend a proposition passed by voters unless the amendment is again voted on by the public through the initiative process.<sup>129</sup> Proposition 19 has incorporated a unique provision, which allows the Legislature to amend the Act through a statute validly passed by the Legislature and signed by the Governor.<sup>130</sup> A further requirement is that the amendment must further the purposes of the Act.<sup>131</sup>

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<sup>123</sup> Text of Proposition 19, *supra* note 29.

<sup>124</sup> *Cal. Prolife Council Political Action Committee v. Scully*, 989 F.Supp. 1282 (E.D. Cal. 1998).

<sup>125</sup> *Id.*

<sup>126</sup> Patton, *supra* note 55 at 189

<sup>127</sup> Text of Proposition 19, *supra* note 29.

<sup>128</sup> *Id.*

<sup>129</sup> Cal. Const. Art. II, §10(c).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Normally, an amendment to an initiative is passed by a 2/3 vote of the Legislature. Proposition 19 allows for a simple majority vote, which enables the legislature to pass amendments more quickly.<sup>132</sup> This is important as the sponsors of Proposition 19 left many questions unanswered that will need to be filled in by the Legislature. However, to safeguard the vote of the people, the authors were careful to include a section, which ensures that the Legislature cannot make an amendment to kill the Act, as it would not be in furtherance of its purposes.<sup>133</sup>

All of the provisions and safeguards surrounding amendments to Proposition 19 may be in response to the difficulties faced when medical marijuana was legalized in California. After Proposition 215 passed in 1996 much litigation arose and continued until the Senate passed A.B. 420 in 2003 to clarify the confusion.<sup>134</sup> Proponents hope that the specific amendment provisions of Proposition 19 will curb most of the litigation, but opponents are convinced that extensive litigation is inevitable.<sup>135</sup>

### *iii. Harmonization with Proposition 215 (California's Compassionate Use Act)*

Proposition 19 should not have much effect on California's medical marijuana laws. Some users of medical marijuana under the Compassionate Use Act have expressed concern that Proposition 19 will detrimentally affect their current rights. For example, under the Compassionate Use Act, individuals with a doctor's permission to grow marijuana for medicinal purposes are able to grow as much as they want, while Proposition 19 would restrict growing to within a 25 square foot plot.<sup>136</sup> In addition, Proposition 19 restricts people from consuming marijuana in "any space while minors are present." To this end, some medical marijuana users are concerned that they will not be able to medicate while minors are present in their homes. In addition, Proposition 19 also provides that all places that sell marijuana must be licensed pursuant to section 11301 of the initiative, while the Compassionate Use Act requires those distributing medical marijuana to obtain a seller's permit through the state board of equalization.<sup>137</sup> Medical marijuana users have expressed concern that if Proposition 19 is passed, distributors licensed under the Compassionate Use Act will then be subject to penalty, or forced to close.<sup>138</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> S.B. 420 §1(a), 2003 Gen. Assem., Reg. Sess. (Ca. 2003).

<sup>135</sup> Yes on Prop 19, Ballot Argument section, *available at*:

<http://yeson19.com/sites/default/files/Yes%20on%2019%20-%20Ballot%20Argument.pdf>.

<sup>136</sup> J. Craig Canada, *California's Proposition 19 will Supersede or Amend its Medical Marijuana Laws*, July 2010, *available at*: <http://www.examiner.com/santa-cruz-county-drug-policy-in-san-francisco/california-s-proposition-19-will-supersede-or-amend-its-medical-marijuana-laws>

<sup>137</sup> Edmund G. Brown, *Guidelines for the Security and Non-Diversion of Marijuana Grown For Medical Use*, August 2008, *available at*:

[http://ag.ca.gov/cms\\_attachments/press/pdfs/n1601\\_medicalmarijuanaguidelines.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf)

<sup>138</sup> Dragonfly De La Luz, *Why Pro-Pot Activists Oppose Prop. 19: 19 Reasons to Vote Now*, July 2010, *available at* <http://votetaxcannabis2010.blogspot.com/2010/07/why-pro-pot-activists-oppose-2010-tax.html>.

However, the concerns listed above may be without warrant. Under California rules of statutory interpretation, overlapping statutes are to be interpreted in harmony if possible, i.e.,<sup>139</sup> whenever possible, the court will give effect to both statutes. Courts will only read a new statute to repeal a previous statute when there is no rational basis for reconciling the two.<sup>140</sup> If Proposition 19 were to pass, it is possible that the courts may seek to give effect to both by applying the Compassionate Use Act to those who use marijuana upon the recommendation of a physician, while applying Proposition 19 to anyone else who engages in marijuana use.<sup>141</sup> For example, in *Miranda v. 21<sup>st</sup> Century Ins.*, the court attempted to reconcile two overlapping statutes regarding discovery procedures for arbitration.<sup>142</sup> One of the statutes was general contractual law that applied to all arbitration.<sup>143</sup> The more specific law applied to uninsured motorist arbitration.<sup>144</sup> The court held that the more specific law, applying to only the uninsured motorists' discovery procedures, was the exception to the general rule.<sup>145</sup> As such, it is possible the court will similarly interpret the marijuana statutes, i.e., the court will find that Proposition 19 is the general statute and the Compassionate Use Act is the exception. Further, one of the stated purposes of Proposition 19 is to make marijuana access easier for individuals consuming for medical reasons; thus, it is likely that the court will not use this initiative to limit the rights that individuals had under the Compassionate Use Act.<sup>146</sup>

## VI. POLICY CONSIDERATIONS

### a. Proponents' Main Arguments

The two main proponents of Proposition 19 are Richard Lee, Executive Director of Oaksterdam University, and Jeffrey Way Jones, former Director of Oakland Cannabis Buyers' Cooperative.<sup>147</sup> There are hundreds of secondary proponents of Proposition 19 including Congressmen Pete Stark and Dan Hamburg, California Senators Don Perata and Mark Leno, California Assembly members Tom Ammiano and Hector De La Torre, Berkeley Mayor, Tom Bates, U.S. Surgeon General Dr. Joycelyn Elders, the National Black Police Association, the California NAACP, the California Libertarian and Green parties, several branches of the California ACLU, the California Council of Churches IMPACT, and the Interfaith Drug Policy Initiative.<sup>148</sup> These proponents advance many arguments in support of Proposition 19. The proponent's main arguments are that Proposition 19 will increase revenue for California, create jobs, put police priorities in order and reduce prison costs, put safety controls on the cultivation, sale and consumption of marijuana, and that marijuana has some legitimate uses.

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<sup>139</sup> *Kirby*, *supra* note 104 at 1370.

<sup>140</sup> *Miranda v. 21<sup>st</sup> Century Ins. Co.*, 117 Cal.App.4th 913, 923-924, 12 Cal.Rptr.3d 159, 166 (Cal.App. 4 Dist., 2004)

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Text of Proposition 19, *supra* note 29.

<sup>147</sup> Yes on Prop 19, Endorsements section, *available at*:

[http://yeson19.com/sites/default/files/taxcannabis\\_endorsements\\_0.pdf](http://yeson19.com/sites/default/files/taxcannabis_endorsements_0.pdf).

<sup>148</sup> *Id.*

*i. Proposition 19 will increase revenue for California*

Proponents' claim that legalization and taxation of marijuana will result in billions of dollars of revenue, which is particularly important as California is facing deficits of historic proportion.<sup>149</sup> According to the the Board of Equalization, a tax on marijuana could generate around \$1.4 billion dollars per year which can be used elsewhere as vital funding including healthcare, roads, public safety, job funding, etc.<sup>150</sup> Furthermore, proponents assert that there is \$14 billion in illegal marijuana sales every year in California, which the state does not currently benefit from.<sup>151</sup> If Proposition 19 passes, California would not only obtain increased revenues from taxing marijuana, it could generate as much as \$12-\$18 billion dollars in spin-off industries such as coffeehouses, tourism, industrial hemp etc.<sup>152</sup> According to proponents, legalizing marijuana would ensure that the people of California get a stake in this billion-dollar industry.

*ii. Proposition 19 will create jobs*

California is currently ranked 3<sup>rd</sup> in the nation with the highest unemployment rate.<sup>153</sup> In this struggling economy, proponents of Proposition 19 suggest that the legalization of marijuana would help to reduce California's soaring unemployment rate through job creation. Proponents claim that thousands of jobs would be created through both the new marijuana industry and also through the revenue gained from taxation.<sup>154</sup>

*iii. Proposition 19 will put police priorities where they belong and reduce prison costs*

Along with raising revenue, proponents assert that legalization of marijuana will save millions or even billions of dollars in prison costs. Proponents cite to FBI data from 2008 saying that over 61,000 Californians were arrested that year for misdemeanor marijuana possession, while 60,000 violent crimes were never resolved.<sup>155</sup> It follows that if people were no longer arrested for marijuana consumption, police could focus on apprehension for more violent crimes and spend less taxpayer money arresting the non-violent offenders. Further studies estimate anywhere from \$300 million to \$1.9 billion in yearly savings in California's prison costs.<sup>156</sup>

*iv. Proposition 19 will help fight the drug cartels and reduce violence in the*

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<sup>149</sup> Yes on Prop 19, Ballot Argument section, *available at:*

<http://yeson19.com/sites/default/files/Yes%20on%2019%20-%20Ballot%20Argument.pdf>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Dale Gieringer Ph.D, *Benefits of Marijuana Legalization in California*, October 2009, *available at:*

[http://www.canorml.org/background/CA\\_legalization2.html](http://www.canorml.org/background/CA_legalization2.html).

<sup>153</sup> Bureau of Labor Statistics, *Unemployment Rates for States*, *available at:*

<http://www.bls.gov/web/laus/laumstrk.htm>.

<sup>154</sup> Yes on Prop 19, Ballot Argument section, *supra* note 149.

<sup>155</sup> *Id.*

<sup>156</sup> *The Law of the Weed; California, Ever a Global Leader in Cannabis Matters, May Forge Ahead Again*, *The Economist*, July 15, 2010, *available at:* <http://www.economist.com/node/16591136>.

### *U.S. and Mexico*

Proponents predict that Proposition 19 would help to dismantle drug cartels in the U.S. and Mexico. They cite to a statistic that 60% of drug cartel revenue comes from the illegal U.S. marijuana market.<sup>157</sup> The proponents hope that by removing California from the illegal market, they will cut off a vital source of funding which will aid in the fight against drug cartels.<sup>158</sup>

#### *v. Proposition 19 will put safety controls on marijuana*

Proponents believe that Proposition 19 will help keep marijuana out of the hand of minors. Currently, illegal marijuana dealers have no motivation to be cognizant of whether their buyers are under 18, or over 18, since the sale of marijuana is illegal regardless. Proponents state that the various safety measures in Proposition 19, including strict criminal penalties for driving under the influence, penalties for providing marijuana to minors, and bans on smoking in public, on school grounds, and around minors will actually make marijuana less accessible to minors.<sup>159</sup> Proposition 19 also requires all cultivators and sellers to be licensed and it puts restrictions on the amount one may grow or have on their possession at any given time.<sup>160</sup> Proponents are confident that marijuana be can taxed and controlled in much the same way as alcohol.<sup>161</sup>

#### *vi. Marijuana has legitimate uses*

Proponents also point out that marijuana has some legitimate health benefits, which outweigh the negatives of the drug. Marijuana is currently used to relive pain or symptoms from nerve damage, nausea, spasticity, glaucoma, chemotherapy, and movement disorders.<sup>162</sup> It can also be used as an appetite stimulant for patients suffering from HIV or dementia.<sup>163</sup> Additionally, proponents state that marijuana has fewer harmful effects than either alcohol or cigarettes and it does not have long-term toxic effects on the body.<sup>164</sup> Further, they argue that marijuana is not physically addictive and that does not cause its consumers to become violent.<sup>165</sup>

### **b. Opponents' Main Arguments**

There are as many, if not more, individuals and organizations that oppose Proposition 19 as there are people who support the initiative. Among the opposition is Senator Dianne Feinstein, Governor Arnold Schwarzenegger, Gubernatorial candidates Meg Whitman and Jerry Brown, various current and former candidates for California Attorney General, MADD, California Police Chiefs

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<sup>157</sup> Yes on Prop 19, Ballot Argument section, *supra* note 149.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Text of Proposition 19, *supra* note 29.

<sup>161</sup> *Id.*

<sup>162</sup> NORML, Medical Use, *available at*:

[http://norml.org/pdf\\_files/NORML\\_medical\\_use\\_introduction.pdf](http://norml.org/pdf_files/NORML_medical_use_introduction.pdf).

<sup>163</sup> *Id.*

<sup>164</sup> Text of Proposition 19, *supra* note 29.

<sup>165</sup> *Id.*

Association, and the National Black Churches Initiative. Their main arguments are centered on health and safety concerns, employer concerns, concern for children and teens, and economic concerns.

### *i. Health and safety concerns*

Opponents of Proposition 10 are concerned about the various effects legalization of marijuana could have on the health of Californians. Opponents argue that with the legalization of marijuana, consumption of the drug would increase because some people have abstained from using for no reason other than its illegality.<sup>166</sup> They support this argument with research showing that following a period of marijuana commercialization and expansion, there was “a tripling of lifetime use rates and a more than doubling of past-month use among 18- to 20-year-olds.”<sup>167</sup>

In addition, opponents are concerned about the effect that legalization of marijuana will have on traffic safety. MADD, police, and firefighters oppose proposition 19 because they believe it enforcement of laws prohibiting driving under the influence will be harder to enforce.<sup>168</sup> Los Angeles District Attorney, Steve Cooley, and California State Firefighters Association President, Kevin Nida, also feel strongly about the impact proposition 19 will have on traffic safety. They state that the initiative does not provide law enforcement with a definition or objective standard for determining what would constitute “driving under the influence.”<sup>169</sup> In addition, because marijuana is shown detrimental to one’s judgment, motor skills and reaction time, opponents are concerned that legalization of marijuana will lead to more impaired drivers, and thus more vehicle accidents.<sup>170</sup> To demonstrate the potential impact on traffic safety, opponents cite a 2004 meta-analysis that found that between 4and 14% of drivers who sustained injuries or died in traffic accidents tested positive for delta-9-tetrahydrocannabinol, or THC, the active component in marijuana.<sup>171</sup>

### *ii. Negative effects on businesses and employers*

The California Chamber of Commerce opposes Proposition 19 because of its impact on employers.<sup>172</sup> According to the Chamber of Commerce, if Proposition 19 is passed, employers may no longer being able to screen potential employees for marijuana use, or terminate employees

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<sup>166</sup> Gil Kerlikowske, et al., Law Enforcement Officials Speak Out Against Proposition 19, *available at*: <http://www.apbweb.com/featured-articles/1683-law-enforcement-officials-speak-out-against-proposition-19-.html>.

<sup>167</sup> *Id.*

<sup>168</sup> *Majority of Voters Opposed or Uncertain About Recreational Marijuana Measure*, September, 2010, available at: <http://www.noonproposition19.com/blog/majority-of-voters-opposed-or-uncertain-about-recreational-marijuana-measure>.

<sup>169</sup> *Id.*

<sup>170</sup> Gil Kerlikowske et al. *Why California Should Just Say No to Prop. 19*: available at: <http://www.latimes.com/news/opinion/commentary/la-oe-0825-kerlikowske-marijuana-20100825,0,5131241.story>.

<sup>171</sup> *Id.*

<sup>172</sup> California Chamber of Commerce, *Proposition 19: The Impact on the Workplace* [http://www.calchamber.com/PressReleases/Documents/Prop\\_19\\_The\\_Impact\\_on\\_the\\_Workplace\\_F.pdf](http://www.calchamber.com/PressReleases/Documents/Prop_19_The_Impact_on_the_Workplace_F.pdf).

who use marijuana without showing the use actually impairs work performance.<sup>173</sup> Opponents also argue that because the initiative requires a showing of actual impairment before employers can take disciplinary action, marijuana would be more protected than alcohol.<sup>174</sup>

The Chamber of Commerce also argues that the passage of Proposition 19 allows employees to smoke marijuana while at work.<sup>175</sup> This, opponents argue, will compromise workplace safety and increase the cost of liability insurance.<sup>176</sup> In addition, Proposition 19 opponents state that the initiative will lead to more wrongful termination lawsuits because individuals terminated for poor performance may claim their marijuana use was the actual, and impermissible, motive behind their termination.<sup>177</sup> Further, opponents argue that Proposition 19, because it prevents employers from complying with federal drug-free workplace requirements, will cause businesses to lose public contracts and grants.<sup>178</sup>

### *iii. Negative impact on neighborhoods and schools*

Opponents of Proposition 19 raise concerns that the proposition does not effectively limit where marijuana can be grown, and advertised. Instead, it delegates the regulatory responsibilities to local governments.<sup>179</sup> Specifically, opponents state that Proposition 19 allows for marijuana growth in a person's front or backyard.<sup>180</sup> It also allows people to grow on their residence, no matter how close they live to courthouses, schools, and hospitals.<sup>181</sup> In addition, there are no restrictions on advertising under the initiative; thus, allowing marijuana advertisements near schools, parks, and libraries, as cigarettes are now.<sup>182</sup>

Regarding schools, opponents state that an employer's inability to prevent school employees from marijuana consumption will affect education and school children's safety.<sup>183</sup> They claim this will lead to a devastating loss in federal funding for education.<sup>184</sup> It will also put children who ride school busses in danger, since the schools will have no right to screen bus drivers based on marijuana use.<sup>185</sup>

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<sup>173</sup> *Id.*

<sup>174</sup> *Impact on Business*, available at: <http://www.noonproposition19.com/impact-on-business>.

<sup>175</sup> California Chamber of Commerce, *supra* note 172.

<sup>176</sup> *Id.*

<sup>177</sup> John Hoeffel, *Business Groups Campaign Against MJ Legalization*, August 2010, available at: <http://www.cannabisnews.org/united-states-cannabis-news/business-groups-campaign-against-mj-legalization/>.

<sup>178</sup> *Impact on Business*, available at: <http://www.noonproposition19.com/impact-on-business>

<sup>179</sup> *Impact on Neighborhoods*, available at: <http://www.noonproposition19.com/impact-on-neighborhoods-owners-cities>.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Impact on Education*, available at: <http://www.noonproposition19.com/impact-on-education>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

Opponents also argue that the term “residence” is defined to vaguely in the initiative. As such, they state, this invites the possibility that a person could, for example, park a trailer on public property and begin legally cultivating marijuana.<sup>186</sup>

#### *iv. Economic concerns*

Some opponents of Proposition 19 are more concerned with the economic aspects of the initiative. Directors of the Office of National Drug Control Policy oppose the proposition because it would increase social costs while failing to raise the revenue the proponents promise.<sup>187</sup> Opponents state, for instance, the healthcare and criminal justice costs associated with alcohol and tobacco more than make up for the tax revenue they raise.<sup>188</sup> The same result is likely to happen with marijuana, opponents say.<sup>189</sup> Tax revenue concerns are also raised because alcohol and tobacco users do not typically make their own alcohol, or grow their own tobacco, while marijuana do; therefore, the tax generated from marijuana is likely to be much less than that generated from alcohol or tobacco sales.<sup>190</sup>

In addition, legalizing marijuana may not, as the proponents claim, reduce the police resources that would need to be dedicated to enforcing marijuana related laws.<sup>191</sup> That is, police still must apprehend individuals who sell marijuana illegally; otherwise there would be no incentive for distributors to become licensed and sell legally, and no tax benefit from these licensed sales.<sup>192</sup> In addition, because of the threat of federal prosecution, individuals may be discouraged from the licensing process. This would significantly decrease the fiscal benefit that proponents anticipate Californians would reap from licensing fees.<sup>193</sup>

## VII. CONCLUSION

Although other countries, such as the Netherlands, have decriminalized marijuana, none have expressly legalized marijuana as proposition 19 would.<sup>194</sup> If passed, Proposition 19 would make it legal for individuals 21 years of age and older to possess and transport small amounts of marijuana, to grow marijuana on their private property within a 25 square-foot plot, and to possess items associated with consuming marijuana. The initiative would also authorize local government to license, regulate and tax commercial marijuana-related facilities. Proposition 19 would not affect any law prohibiting use of controlled substances in the workplace, laws regarding contributing to the delinquency of a minor, laws regarding driving under the influence, or laws

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<sup>186</sup> *Id.*

<sup>187</sup> Kerlikowske, *supra* note 170.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Vitiello, *supra* note 53 at 1386.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1356.

<sup>194</sup> Kerlikowske, *supra* note 170; Jeffrey Stinson, *Understanding the Netherlands Marijuana Policy*, submitted June 2008, available at: [http://www.usatoday.com/news/world/2008-06-27-amsterdam-marijuana\\_N.htm](http://www.usatoday.com/news/world/2008-06-27-amsterdam-marijuana_N.htm).

## **Proposition 19**

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prohibiting possession of marijuana on school grounds. The change in law may raise revenue that would be channeled back into local governments.

A “yes” vote would give Californians the right to personal use of marijuana without a doctor’s recommendation, which is currently required by the Compassionate Use Act. Further, if the proposition is passed it would create commercially licensed marijuana distributors in the state of California.

If Proposition 19 is not passed, marijuana related activities remain illegal in California, except when the marijuana sales, growth, or use is authorized by the Compassionate Use Act.